No. 06-561

In The Supreme Court of the United States

BEVERLY SMITH,

Petitioner,

v.

LESLIE J. KRYZANOWSKI, ANGELA SMITH, and DEANNA COOK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF DEANNA COOK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Deanna Cook ("Cook"), by counsel, respectfully submits that Petitioner Beverly Smith's ("Smith") Petition for Writ of Certiorari should be denied, and that the Court should decline to review this case.

OPINIONS BELOW

The July 26, 2006 Opinion of the Supreme Court of Virginia is attached to Smith's Petition at Appendix A. In that Opinion, the Court found that "there is no reversible error in the judgment complained of," and the Court accordingly denied Smith's petition for an appeal. Smith was seeking an appeal from a January 19, 2006 Order of the Circuit Court of the City of Richmond, Virginia, dismissing her claim under 42 U.S.C. § 1983 and dismissing various state-law claims, against Cook and other defendants.

JURISDICTION

Smith filed her Motion for Judgment in the Circuit Court for the City of Richmond, Virginia, alleging state law claims as well as her claim under 42 U.S.C. § 1983 against the various private party defendants. Following the Circuit Court's dismissal of her claims, Smith petitioned for an appeal to the Supreme Court of Virginia. This Court has jurisdiction to review (or decline to review) the decision of that Court not to grant Smith's petition with respect to Smith's claim under 42 U.S.C. § 1983.[1]

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[1] Smith's Petition for Certiorari addresses only her claim that Cook is liable as a "state actor" under 42 U.S.C. § 1983, and not to her separate state law negligence claim.

STATEMENT OF THE UNDERLYING PROCEEDINGS AND THIS CASE

Smith is the paternal grandmother of Stone Wyatt Smith, a minor who was the subject of a custody and visitation dispute in the Juvenile and Domestic Relations Court of Gouchland County, Virginia ("J & D Court"). See Amended Motion for Judgment, ¶ 5, attached to Smith's Petition as Appendix D. The child's parents are Angela Dawn Smith and Dean E. Smith. Id. Cook represented Angela Smith in the J & D Court proceedings. Id., ¶ 4.

On August 8, 2002, the J & D Court entered a Temporary Order, expressly providing that "[d]uring the periods that child is with the father, the child shall ***not*** be left alone with Paternal Grandmother." (Emphasis supplied). A copy of that Temporary Order is attached hereto as Appendix A and was submitted in support of Cook's demurrer. Smith was at the time living with her son, and the J & D Court's express direction that the child not be left alone with Smith resulted from an issue being raised as to whether the child was safe in Smith's presence.

The J & D Court's Temporary Order further provided that a full hearing would be held on January 30, 2003, to address all custody and visitation issues. See Temporary Order (Appendix A). The hearing was held on the scheduled date, and the J & D Court subsequently entered its Pendente Lite Order dated March 13, 2003. A copy of that Pendente Lite Order is attached hereto as Appendix B and was submitted in support of Cook's demurrer. Notably, even the second Pendente Lite Order expressly provided that "[t]he child shall ***not*** be alone with the paternal grandmother." (Emphasis supplied).

In advance of the scheduled hearing, Cook was advised by Dean Smith's attorney, James A. Nachman,

Esquire, that he intended to call Dr. Leslie J. Kryzanowski to testify in support of his client's case. Dr. Kryzanowski was Smith's psychiatrist, and Smith's fitness was directly at issue in the custody proceedings. Cook therefore issued a subpoena, with a copy sent to Mr. Nachman, directing Dr. Kryzanowski to produce her file relating to her treatment of Smith. A copy of the subpoena is attached hereto as Appendix C. Attorney Nachman also issued a subpoena for Dr. Kryzanowski to testify at the scheduled January 30, 2003 hearing. A copy of that subpoena is attached hereto as Appendix D.[2]

A copy of Cook's subpoena was therefore served on Mr. Nachman, who appeared to Cook to be serving as counsel for Beverly Smith as well as her son. Cook did not copy Smith directly with her subpoena to Dr. Kryzanowski, but neither did Nachman (who presumably informed Smith that he had issued a subpoena to Dr. Kryzanowski).

On October 28, 2004, Smith (represented by her current counsel) filed a Motion for Judgment, accusing Cook and other defendants of "Constitutional violations" actionable under 42 U.S.C. § 1983 (Count I), and further accusing Cook and other defendants of "negligence"

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[2] Indeed, Smith had expressly and in writing waived any privilege and consented to having Dr. Kryzanowski testify at the hearing. By letter dated July 8, 2002, Smith advised Mr. Nachman that she was granting permission for him to speak with her and for Dr. Kryzanowski to testify in court. A copy of that letter is attached hereto as Appendix E. Mr. Nachman then wrote to Cook, advising her that "we are prepared to have Mrs. Smith's psychologist to [sic] testify or produce an Affidavit stating that it is perfectly acceptable for Stone to be in the company of his paternal grandmother." A copy of that letter is attached hereto as Appendix F. Although these two letters were conveniently not referenced in or attached to Smith's amended pleading, the trial court's power to sustain Cook's demurrer did not depend upon consideration of these documents.

(Count II).[3] Smith essentially complained that Cook invaded her "privacy" by issuing the subpoena for Dr. Kryzanowski's records, without specifically providing her a copy of the subpoena. Notably, Smith did not raise any complaint that her son's attorney issued a subpoena to Dr. Kryzanowski, directing that she appear at the J & D Court to give testimony as to her mental condition and fitness to be alone with the infant.

Moreover, Smith failed to allege that, even if she *had* sought to object to the subpoena for Dr. Kryzanowski's records, the J & D Court would have quashed the subpoena and refused to require production of the documents. In fact, Smith had been seeing a psychiatrist for serious psychiatric problems for some ten years *before* Cook issued the subpoena for Dr. Kryzanowski's records, and the J & D Court had repeatedly ruled (as a result of those problems) that Smith could not be left alone with the minor child. In addition, Smith failed to allege that Dr. Kryzanowski's records were disseminated to any third parties outside the relevant court proceedings.

Following a hearing on the defendants' demurrers and pleas, the trial court issued a Letter Opinion dated June 2, 2005, sustaining Cook's demurrer to Counts I and II. The trial court ruled that Smith's pleading failed to allege any state action as required for a claim under 42 U.S.C. § 1983, and that "even under liberal pleading rules applicable to claims of negligence, the plaintiff has failed to allege a cause of action for negligence." The trial court's rulings were then incorporated into an Order entered on June 27, 2005.

Because of an impending trial date in the case, Cook and the other defendants were compelled to incur the time and expense of discovery, which only confirmed the frivolousness of the claims being asserted. For example,

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[3] Additional counts were also asserted against other defendants.

Smith's counsel took the deposition of Dr. Kryzanowski, who testified that she met with Smith three days after receiving the documents subpoena issued by Cook in the underlying custody case, that it was her practice always to discuss such a subpoena with the patient, that she has no reason to believe she did not follow her practice in this case, and that she would not have released the records without Smith's express authorization. Likewise, Smith's son (Dean Smith) testified in deposition that he recalled Cook's subpoena being discussed at the dinner table with his mother.

Smith filed her "First Amended Motion for Judgment" on June 15, 2005. The amended pleading repeated the same claims against Cook that were previously dismissed upon Cook's initial demurrer, *i.e.* a civil rights claim under 42 U.S.C. § 1983 and a negligence claim. Despite additional verbiage, there were no additional facts alleged in the amended pleading to support any claim against Cook (or the other defendants).

Cook and the other defendants thereupon filed their demurrers and pleas in response to the amended pleading. A hearing was held on October 11, 2005, after which the trial court issued a Letter Opinion dated October 17, 2005, sustaining Cook's demurrer to Smith's civil rights claim without leave to amend. The trial court, at that time, overruled Cook's demurrer to Smith's negligence claim.

Cook thereupon filed her motion for reconsideration and/or for summary judgment, with respect to Smith's negligence claim under Count II. Following argument, the Court issued its Letter Opinion dated November 22, 2005, sustaining Cook's demurrer to Count II without leave to amend. The Court ruled that the amended pleading failed to allege any recoverable damages. The trial court entered a final Order on January 19, 2006, sustaining the demurrers of Cook and the other

defendants, and dismissing Smith's Amended Motion for Judgment with prejudice.

As noted above, the Supreme Court of Virginia refused to grant Smith's petition for appeal by Opinion dated July 26, 2006.

REASONS FOR DENYING THE WRIT

As demonstrated below, there is no compelling reason for this Court to grant a writ of certiorari in this case. The Richmond Circuit Court correctly dismissed Smith's lawsuit, and the Supreme Court of Virginia correctly declined to grant Smith's appeal. Neither decision conflicts with any decision by this Court, or with any decision of another state court of last resort or a United States court of appeals. Moreover, both the Circuit Court decision and the Supreme Court of Virginia's decision at issue are unpublished. Smith fails to cite any case supporting her contention that a private attorney who invokes state subpoena procedures is a "state actor" subject to civil rights claims under 42 U.S.C. § 1983.

I. Smith Failed to Allege any Facts Showing that Cook Acted under Color of State Law.

Smith's lawsuit is but the latest in a disturbingly long line of frivolous civil rights claims asserted by disgruntled litigants, who turn their frustration and wrath against attorneys, judges, adverse parties, and other participants in the judicial system:

> **This action, filed [pro se], is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, 42 U.S.C. §§ 1981-1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by**

> **the results of such proceedings, these persons lash out at judges, attorneys, witnesses, court functionaries, newspapers and anyone else in convenient range, terming all of them corruptly evil and charging them with perjury and conspiracy in a last desperate effort to re-litigate the issues on which they have once lost and hoping to secure sizeable damages to boot.**

Jemzura v. Belden, 281 F. Supp. 200, 204 (N.D.N.Y. 1968) (emphasis added), quoting Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Cal. 1966).

In this case, Smith was merely upset that the J & D Court, charged with considering the best interests of the child, determined that the child should not be left alone with her. Smith's lawsuit was therefore a collateral attack on the J & D Court's ruling, under the guise of a "civil rights" claim against some of those who participated in the custody proceedings.

The courts in Virginia and elsewhere have routinely dismissed civil rights claims against attorneys and others involved in prior litigation, often with an award of sanctions against the plaintiff. See Davis v. Hudgins, 896 F. Supp. 561 (E.D. Va. 1995) (dismissing civil rights claims against attorneys and others, and awarding Rule 11 sanctions against *pro se* plaintiff), aff'd, 87 F.3d 1308 (4th Cir. 1996), cert. denied, 520 U.S. 1172, 117 S. Ct. 1440, 137 L. Ed. 2d 546 (1997); Snyder-Falkinham v. Stockburger, 1996 WL 1171800 (W.D. Va., Aug. 5, 1996) (dismissing civil rights claims by disgruntled state court litigant against attorneys and law firms, and awarding Rule 11 sanctions against plaintiff and her counsel), aff'd,

2002 WL 31829717 (4th Cir. 2002), cert. denied, __ U.S. __, 123 S. Ct. 2645, 156 L. Ed. 2d 658 (2003).[4]

Moreover, the courts have consistently rejected Smith's argument that an attorney who invokes state subpoena procedures is a "state actor" subject to civil rights claims under 42 U.S.C. § 1983. See, e.g., Angelico v. Lehigh Valley Hospital, Inc., 184 F.3d 268, 278 (10th Cir. 1999) ("We hold, therefore, that an attorney does not become a state actor simply by employing the state's subpoena laws.") (dismissing civil rights claim under Section 1983 against attorneys who issued subpoenas for documents); Hahn v. Star Bank, 190 F.3d 708, 717 (6th Cir. 1999) ("[W]e now put this circuit on record as holding that a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983.") (affirming summary judgment dismissal of civil rights claims), cert. denied, 529 U.S. 1020, 120 S.Ct. 1423, 146 L.Ed.2d 314 (2000); Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983) ("Plaintiff's allegation that the attorney acted under color of state law when he employed the device of a subpoena duces tecum does not rise to the level of acting together with or obtaining significant aid from state officials. Nor is the conduct otherwise chargeable to the state.... [T]he attorney does not become

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[4] See also Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981) (affirming dismissal of civil rights claims against former criminal defense counsel, prosecutors, trial judges, witnesses and court reporters), aff'd, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); Waits v. McGowan, 516 F.2d 203 (3d Cir. 1975) (affirming dismissal of civil rights claims against public defender, prosecutor, state judges and state investigatory); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965) (dismissing civil rights claims by litigant against judges, attorney and bailiff); Raitport v. Provident National Bank, 451 F. Supp. 522 (E.D. Pa. 1978) (dismissing civil rights claims against, inter alia, counsel for plaintiff's creditors); Hamilton v. Jamieson, 355 F. Supp. 290 (E.D. Pa. 1973) (dismissing civil rights claims against judges, prosecutors and defense attorneys); Jemzura v. Belden, supra (dismissing civil rights claim against state officials and attorneys by unsuccessful litigant in marital litigation).

a state actor merely by employing state authorized subpoena power.") (affirming dismissal of civil rights action against attorney); Dyess v. Louisiana State University Board of Supervisors, 2005 WL 2060915 (E.D. La., Aug. 19, 2005) ("Other circuits have consistently held that an attorney cannot fairly be said to have become a state actor merely because he issues a subpoena.... This Court concurs with these decisions and holds that a private attorney's issuance of a subpoena does not make the attorney a state actor for purposes of § 1983.") (dismissing civil rights claims against attorneys) (unpublished); Bochetto v. Labrum & Doak, LLP, 1997 WL 560191 (E.D. Pa., Aug. 28, 1997) ("It follows, according to plaintiffs, that the issuance of a subpoena by a private party can be fairly attributable to the state, and thus state action exists. I disagree.") (dismissing civil rights claims against attorneys) (unpublished).[5]

II. The Opinions of the Richmond Circuit Court and the Supreme Court of Virginia Did Not Decide any Important Question of Unsettled Federal Law, or Conflict with any Decision of Another State Court of Last Resort or any United States Circuit Court.

The issue presented in this case, *i.e.* whether a private attorney is a state actor for purposes of 42 U.S.C. § 1983 when invoking state subpoena procedure, is not unsettled. Rather, as demonstrated by the cases cited above, the courts have consistently held that such

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[5] See also Smith v. Hilltop Basic Resources, Inc., 99 Fed. Appx. 644, 649 (6th Cir. 2004) ("*Hahn* dictates that a private attorney issuing a subpoena does not become a state actor for the purposes of section 1983. Plaintiffs' tenuous efforts to extend the state action rationale ... to Hilltop, which merely issued subpoenas and opposed plaintiffs' motion to quash, are unavailing. Plaintiffs simply cannot establish action under color of state law.") (affirming dismissal of civil rights claims) (unpublished).

conduct is *not* state action that will support a civil rights claim. Likewise, Smith does not cite *any* case in her Petition in which it was held otherwise.

As a result, Smith has not presented any reason for this Court to exercise its discretion to grant her petition.

CONCLUSION

For the foregoing reasons, Respondent Deanna Cook respectfully request that the Petition for Writ of Certiorari be denied.

Deanna Cook

By: /s/
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APPENDIX A

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE: Stone Wyatt Smith
FILE NO. JJ-5582-01

The following parties were present:

( ) Juvenile (x) G.A.L.

(x) Father (x) Atty. For Father

(x) Mother (x) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS (x) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial (x) Status and to Set Temporary Order

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERED THAT:

The Parties will share custody on a week to week basis with Dad having the child beginning August 9, 2002 at 4:35 pm. Child will return to Mother on Friday August 16, 2002 at 5:45 pm. Exchange of child will take place at the babysitters residence, Glenda Mosely, and said visitation shall continue on a week to week basis thereafter.

The Parties will continue to utilize the current babysitter Glenda Mosely. The parties will provide the other parent first option when a babysitter is needed outside the regular schedule with Glenda Mosely or when she may be unavailable.

THIS CASE IS CONTINUED TO Full Hearing on January 30 2003 at 9:30 in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERED THAT:

During the periods that child is with the father the child shall not be left alone with paternal grandmother.

If either parent takes the child out of town for a period of 24 hours or more then that parent shall notify the other parent of where the child will be and provide contact information.

Both parties are hereby referred to their local community services board or private provider for SA evaluations to include random urine screens. A report shall be filed with the court and GAL.

THIS CASE IS CONTINUED TO Full hearing - Jan. 30, 2003 at 9:30 in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERD THAT:

Both Parties are hereby referred to Dr. Tim Amster for individual psychological evaluations. Sessions shall include the minor child at the direction of Dr. Amster. Dr. Amster shall have the opportunity to observe interaction between each parent and the minor child. A report shall be filed with the court and GAL.

Holidays will be shared: Thanksgiving Holiday - Dad will keep child from 11/15 - 11/24 and 11/24 - 11/27 child w/

mom; Da[illegible]ll then get child on 11/27 - 11/28 at 2 pm. Mom will [illegible]arn child 12/1 at 6 pm to [illegible] child's Birthday - Dad shall have child on Sat 4/14 at 6pm until Sun, 9/15 at 12:00 pm

THIS CASE IS CONTINUED TO Full hearing on January 30, 2003 at 9:30 am in Charlottesville

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge

VIRGINIA: GOOCHLAND JUVENILE AND DOMESTIC RELATIONS COURT

IN RE:
FILE NO.

The following parties were present:

( ) Juvenile ( ) G.A.L.

( ) Father ( ) Atty. For Father

( ) Mother ( ) Atty. For Mother

( ) DSS Representative ( ) Atty. For DSS

Type of Case: ( ) Felony ( ) Misdemeanor ( ) CHINS ( ) Custody ( ) Visitation ( ) Support Order ( ) Motion to Amend ( ) Other

Type of Hearing: ( ) Determination/appointment of counsel ( ) Detention Hearing ( ) Transfer Hearing ( ) Adjudicatory Hearing ( ) Disposition Hearing ( ) Continuance ( ) Review ( ) Show Cause ( ) Trial ( ) _____

Plea: ( ) guilty ( ) not Guilty

IT IS ORDERD THAT:

Christmas Holiday: child will go with Mom Christmas Day at 12:00 noon. Mom will keep child until 9am Sat. 12/28 wherein Child will stay with dad until Monday Dec 30 9 am. Child will go back to mom on 12/30 for her remaining weekly visitation. Regular visitation then begins with Dad on January 3, 2003 at 5:45pm New Years: Dad to get child at 12:00 noon New Years Day, 1/1/03 and return 1/2/03 at 9am.

If babysitter unavailable for exchange then exchange shall occur at the residence of Tyler Duffy

August 8, 2002
Date

Edward J. Berry
Edward Dej. Berry, Judge